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No. 02-1624

IN THE SUPREME COURT OF THE UNITED STATES

ELK GROVE UNIFIED SCHOOL DISTRICT AND DAVID W. GORDON, SUPERINTENDENT, PETITIONERS

v.

MICHAEL A. NEWDOW, RESPONDENT

On Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF RELIGIOUS SCHOLARS AND THEOLOGIANS IN SUPPORT OF RESPONDENT

Peter Irons
Director, Earl Warren
Bill of Rights Project
9500 Gilman Drive
San Diego, CA 92093-5521

Counsel of Record for Amici

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INTEREST OF AMICI[1]

Amici are 19 professors and scholars in the fields of religion and theology who are knowledgeable about the history of religion in American society.

Joseph A. Adler, Professor of Religion, Kenyon College.

Randall Balmer, Ann Whitney Olin Professor of American Religion, and Chair, Department of Religion, Barnard College, Columbia University.

Linell E. Cady, Franca Oreffice Dean's Professor of Religious Studies and Director, Center for the Study of Religion and Conflict, Arizona State University.

Diana L. Eck, Professor of Comparative Religion, Harvard Divinity School; Director, the Pluralism Project. Harvard University.

W. Clark Gilpin, Margaret E. Burton Professor of the History of Christianity, University of Chicago Divinity School.

Philip Goff, Associate Professor of Religious Studies and Director, Center for the Study of Religion and American Culture, Indiana University.

John S. Hawley, Ann Whitney Olin Professor, Department of Religion, Barnard College, Columbia University.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No party authored this brief in whole or in part and no one other than amici or their counsel made a monetary contribution to the preparation or submission of the brief.

Gary Laderman, Associate Professor of American Religious History and Culture, and Director, Graduate Division of Religion, Emory University.

Amy-Jill Levine, E. Rhodes and Leona B. Carpenter Professor of New Testament Studies, Vanderbilt Divinity School, Vanderbilt University.

Fumitaka Matsuoka, Professor of Theology, Graduate Theological Union, Pacific School of Religion, Berkeley, California.

Vasudha Narayanan, Professor of Religion, University of Florida.

Charles Prebish, Professor of Religious Studies, Pennsylvania State University.

Stephen Prothero, Associate Professor of Religion and Chair, Department of Religion; Director, Graduate Division of Religious and Theological Studies, Boston University.

Richard Seager, Associate Professor in Religious Studies, Hamilton College.

John Smolenski, Assistant Professor of History, University of California, Davis.

Ivan Strenski, Professor and Holstein Endowed Chairholder, Department of Religious Studies, University of California, Riverside.

Robert A. Thurman, Jey Tsong Khapa Professor of Indo-Tibetan Buddhist Studies and Director of Graduate Studies, Department of Religion, Columbia University.

Thomas A. Tweed, Professor of Religious Studies, University of North Carolina.

Peter W. Williams, Distinguished Professor of Comparative Religion and American Studies, Miami University (Ohio).

Amici are scholars in the fields of American religious history and theology. Among the amici are represented such religious traditions as Christianity, Judaism, Buddhism, and Hinduism. A summary of the qualifications and affiliations of the individuals listed above is provided in the appendix to this brief. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.

STATEMENT

On June 14, 1954, a remarkable ceremony took place on the steps of the U.S. Capitol. Earlier that day, President Eisenhower had signed House Joint Resolution 303, which added "under God" to the Pledge of Allegiance. In signing the Joint Resolution, President Eisenhower declared:

> "From this day forward the millions of our schoolchildren will daily proclaim . . . the dedication of our Nation and our people to the Almighty." 100 *Cong. Rec.* 8617 (1954).

Now, under clear skies, with members of both parties of Congress assembled, including top Congressional leaders, the U.S. flag was hoisted over the Capitol, and the newly-revised Pledge was recited by Senator Homer Ferguson and Representative Louis Rabaut, the co-sponsors of the Joint Resolution. A young Walter Cronkite narrated the event, which was carried live on television and radio by the Columbia Broadcasting System. The Senate Chaplain, Rev. Frederick Brown Harris, later described the scene:

> "As the radio carried their voices to listening thousands, together these lawmakers repeated the pledge which is now the Nation's. Then, appropriately, as the flag was raised a bugle sang out with the familiar strains of 'Onward, Christian Soldiers!'" *Id. at* 8617.

That same day, as the House convened, a Baptist minister offered this prayer:

> "May the flag of our great nation continue to wave as a symbol of freedom, democracy, and Christian principles upon which our beloved Nation has been founded." *Id.* at 8171.

Although the hymn played on the bugle was not sung, the words of its first verse are well-known:

> "Onward, Christian soldiers, marching as to war,
> With the cross of Jesus, going on before.
> Christ, the royal Master, leads against the foe;
> Forward into battle see his banners go!"

It would be hard to imagine, outside the sanctuary of a Christian church, a more sectarian religious ceremony. The 1954 revision to the Pledge through its inclusion of "God" officially linked patriotism not just to Christianity but to monotheism—a religious doctrine not shared then or now by millions of Americans who adhere to non-theistic or polytheistic religions or to no religion. The 1954 revision thus not only favors religion over non-religion; it also favors some religions over others.

SUMMARY OF ARGUMENT

From 1892 to 1954, the Pledge of Allegiance defined patriotism and national identity without reference to religion. Composed in 1892 to celebrate the four-hundredth anniversary of Columbus's first voyage to the New World, the Pledge was meant to instill patriotism in American schoolchildren and help "Americanize" a nation of immigrants. In the five decades that followed, the nation grew westward; absorbed millions of immigrants; fought two World Wars; and experienced vast social change. During this period, recitation of the Pledge in public elementary and secondary schools became mandatory in many states. Throughout this time of social and political upheaval, one could pledge allegiance to the flag without embracing religion.

Then the Cold War intervened. In defiance of "godless Communism," Congress added "under God" to the Pledge, incorporating – as an official element of patriotism – an affirmation of a belief in "God" and loyalty to the ideal of a nation defined by religious devotion. Thenceforth schoolchildren would participate in a patriotic ritual that embraced religion as a means of distinguishing America from her foes.

Although the Cold War has ended, the Pledge remains an exercise in religious affirmation. As a purely textual matter, its reference to "one Nation under God" assumes the existence of "God" and expresses a conception of America as a nation defined by religious devotion. The phrase "under God" in the Pledge is no more an "acknowledgment" of historical fact than are the Pledge's references to "indivisibility," "liberty," and "justice." All are ideals that the Pledge affirms. Other historical texts that are read in classrooms may invoke religion, but the Pledge alone is meant as an expression of personal belief.

As such, classroom recitation of the Pledge, as revised in 1954, cannot be distinguished from the religious exercises invalidated in *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Like those exercises, the Pledge violates the neutrality principles of the Establishment Clause by favoring religion over non-religion and some religions over others. The Pledge puts schoolchildren who do not embrace monotheism to the Hobson's choice of affirming religious beliefs they do not hold and foregoing participation in a patriotic ritual. For a public elementary or secondary school to put children to such a choice violates the Establishment Clause.

ARGUMENT

I. FOR ITS FIRST 60 YEARS THE PLEDGE WAS WHOLLY SECULAR.

A. Flag Display and Patriotic Exercises in Public Schools Began as Efforts To Heal the Divisions of the Civil War and To "Americanize" the Immigrant Population.

The origins of the Pledge of Allegiance to the flag of the United States, and the national values the flag symbolizes, are rooted in several developments in American society during the last two decades of the nineteenth century. The most important factor lay in the rapid growth and spread of public schools across the country in the years that followed the Civil War. Local communities undertook the task of educating every child, at least through the primary grades. The principal function of schooling was the development of a literate citizenry and work force, with training in reading, writing, and arithmetic. But the schools were also charged with inculcating in their students a sense of patriotism and national loyalty. This was particularly true in the former Confederate states, to heal the divisions of the Civil War and to replace regional loyalties with loyalty to the nation as a whole. Speaking in 1876, the Governor of Virginia declared: "That we are becoming a nation, according to the real signification of the word, I am proud to assert." M. Curti, *The Roots of American Loyalty*, 188 (1946).

The American flag became a symbol of the reunited Republic, and the Grand Army of the Republic ("G.A.R."), an association of former Union soldiers, joined with Southern patriotic groups like the Daughters of the Confederacy to seek state legislation that would require schools to display the American flag in classrooms. In 1890, North Dakota and New Jersey became the first states to mandate flag display in every school; they were followed by several other

states in the next few years. *Id.* at 190-91. The G.A.R. national Commander-in-Chief praised this effort in 1892: "Let the 8,000,000 boys and girls in our elementary schools be thus imbued with a reverence for the flag and all it represents." Quoted in S. Guenter, *The American Flag, 1777-1924*, 105 (1990).

Advocates of patriotic exercises in public schools sought not only to heal Civil War divisions through the common national loyalty symbolized by the flag, but also to Americanize the children of the great wave of immigrants who flocked to the United States in the late nineteenth and early twentieth centuries from central and southern Europe. In part, these efforts at Americanization reflected fears of radical political sympathies among the new immigrants, many of whom joined the Socialist party and labor unions. Patriotic groups and state education officials agreed on "the need for a wholesale and thoroughgoing effort to Americanize the immigrant, the faster the better. . . . The chief reliance was on formal education. It was believed the public school would Americanize immigrant children." Curti, *supra*, at 185-86; see also L. Bartlett & L. Frost, "The Pledge of Allegiance in the Public Schools on the 200th Anniversary of the Bill of Rights," 67 *Educ. L. Rep.* 867, 868-69 (West 1991). The Pledge of Allegiance soon became an integral part of this project.

B. The Pledge of Allegiance Was Composed To Celebrate the Quadricentennial of Columbus's First Voyage to the Americas.

The impetus for drafting a Pledge of Allegiance to the American flag began in the years that preceded the four-hundredth anniversary of Columbus's first voyage to the New World in 1492. The editors of *The Youth's Companion*, the most widely-circulated periodical in the country, decided to promote a celebration of this anniversary in every American public school. As part of this campaign, Francis

Bellamy, the magazine's assistant editor, undertook to draft a pledge of allegiance that would be recited by students who participated in the Columbian celebration. Bellamy composed a pledge that made no reference to religion: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for All." Guenter, *supra*, at 130-131. See Ch. 6, "The Flag Ritual Comes to the Public Schools: Development and Dissemination of the Pledge of Allegiance," 114-32.

During the summer of 1892, Bellamy went to Washington, D.C. and successfully lobbied for a presidential proclamation supporting the Columbian celebration and the new Pledge of Allegiance. President Harrison issued a proclamation that stated: "Let the National Flag float over every school house in the country, and the exercises be such as shall impress upon our youth the patriotic duties of American citizenship." *Id.* at 130. The ceremonies that took place in thousands of schools on October 21, 1892 were a great success and prompted many schools to make recitation of the Pledge a part of regular classroom exercises.

The flag salute and Pledge first became required by law in New York in 1898. The day after the United States declared war on Spain, the New York Legislature passed a law mandating "a salute to the flag at the opening of each day of school," and the Pledge that Bellamy had composed became a part of this daily ritual. Other states quickly followed suit and by the end of the First World War a majority of states required daily flag salutes and recitation of the Pledge of Allegiance in their public schools. *Id.* at 132. See also D. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy*, Ch. 1, "Patriotism in the Schools: The Flag-Salute Ceremony," 1-16 (1962).

Although Bellamy was an ordained Baptist minister and a former pastor of the Dearborn Street Baptist Church in Boston, the Pledge he composed included no reference to

"God" or religion but was entirely secular in its wording. Many patriotic exercises outside the public schools included prayers and invocations of God's blessings, but the flag ceremonies in the public schools featured a Pledge of Allegiance that – like the U.S. Constitution itself – contained no mention of God.

After World War One, the American Legion and other patriotic groups mounted campaigns to frame a uniform set of protocols for the proper display and handling of the flag. At the Legion's invitation, representatives of sixty-eight organizations met in Washington, D.C. for the first National Flag Conference in 1923. The conference, which was addressed by President Harding, voted to change the wording of Bellamy's pledge from "I pledge allegiance to my flag" to "I pledge allegiance to the flag of the United States." The Second (and final) Flag Conference in 1924 approved adding the words "of America" after "the United States" in the Pledge. The American Legion also took the initiative during the Second World War to persuade Congress to adopt a national flag code, which came to include the Pledge of Allegiance. Pub. L. No. 623, Ch. 435, Sec. 7, 56 Stat. 380 (1942). As revised by the 1923 and 1924 flag conferences and as codified by Congress in 1942, this version of the Pledge of Allegiance, which made no reference to God, remained unchanged until 1954. Guenter, *supra*, at 175-78.

II. THE 1954 ACT INFUSED THE PLEDGE WITH RELIGION.

Before 1954, neither Congress nor the state legislatures felt compelled to invoke the name of God in the flag rituals that were designed to foster patriotism and loyalty among the nation's schoolchildren. That loyalty was to rest on an affirmation of the values of "liberty and justice," which distinguished the United States from its wartime enemies. Those enemies themselves employed slogans such as "Gott Mit Uns" ("God is with us") to rally citizens behind their

war efforts. The countries against which the United States waged war in the Spanish American War and the World Wars also had strong religious cultures and traditions, many of them shared by most Americans, and a specific profession of religious devotion would have served no national purpose.

During the Cold War, however, the worldwide contest between democracy and communism became infused with public religiosity in the United States. Public officials at every level of government denounced "godless Communism" and called on Americans to affirm their belief in God by way of contrast. These appeals were often couched in sectarian terms, most often those of the dominant Christianity of the American public. Two examples, drawn from many others in the pages of the *Congressional Record*, illustrate the sectarian nature of political rhetoric during the Cold War years.

Speaking on the House floor in 1953, during the Korean War, Representative Williams of Mississippi stated:

> "In our world of the 20th century, the evil forces of . . . communism seek to remove religion as the most formidable barrier to its advances. So, while we fight the enemy physically on the battlefield and psychologically at home, we could well remember that his greatest and most formidable foe—the one to which he must inevitably surrender—is symbolized in the form of a cross, and is dedicated to furthering the cause of Him who died on Calvary." 99 *Cong. Rec.* 6441 (1953).

The same year, Representative Long of Louisiana drew this contrast between Christianity and communism:

> "Christians believe in God, and Communists do not. Belief in God carries with it certain results—reality of spiritual existence, the worth and dignity of the individual, a future judgment and eternal life—the Marxian philosophy denies and ridicules religion. It is hostile to all religion. It holds an antireligious theory. It is itself seeking to displace Christianity." 99 *Cong. Rec.* A4784 (1953).

The Cold War battle against "godless communism" forms the background against which "under God" was added to the Pledge. See D. Kirby, ed., *Religion and the Cold War* (2002); see also *Wallace v. Jaffree*, 472 U.S. 38, 60 n.49 (1985) ("a statute cannot be divorced from the circumstances existing at the time it was passed") (internal quotations and citations omitted). The message of the 1954 Act – *"We," unlike "they," believe in, live under, and depend on God* – employed religious affirmation to distinguish the United States from her foes. Like the religious oaths of earlier periods, this was an affirmation the "godless communists" could not make.

The campaign to add "under God" to the Pledge was sectarian in origin. The campaign was launched in 1952 by the Knights of Columbus, a Roman Catholic fraternal group. In 1951, the Knights' Supreme Council had adopted a resolution calling for "under God" to be included in the Pledge recited at the group's local meetings. The following year, the Supreme Council voted to petition Congress to add "under God" to the codified Pledge. C. Kaufman, *Faith and Fraternalism: The History of the Knights of Columbus, 1882-1982*, 385 (1982). Bills to add "under God" to the Pledge were introduced by Senator Homer Ferguson and Representative Louis C. Rabaut, both of Michigan. When he introduced his bill, Senator Ferguson stated:

> "What better training for our youngsters could there be than to have them, each time they pledge allegiance to Old Glory, reassert their belief *in the all-present, all-knowing, all-seeing, all-powerful Creator.*" 100 Cong. Rec. 5915 (1954) (emphasis added).

Representative Rabaut voiced similar views to the House:

> "[T]he unbridgeable gap between America and Communist Russia is the belief in Almighty God. . . . Unless we are willing to *affirm our belief in the existence of God* and his creator-creature relation to man, we drop man himself to the significance of a grain of sand and open the floodgates to tyranny and oppression." 100 Cong. Rec. 1700 (1954) (emphasis added).

Congressional sponsors of the Pledge amendment made clear that their primary motivation was to ensure "that every day our children go to school and make their pledge of allegiance to the flag they recall that they do so with *recognition of God*." *H.R.J. Res. 243 and Other Bills on Pledge of Allegiance: Hearing Before Subcomm. No 5 of the House Comm. on the Judiciary*, 83d Cong. 37 (1954) (statement of Rep. Rodino) (emphasis added).

Later in 1954, Luke Hart, Supreme Commander of the Knights of Columbus, addressed the group's annual meeting:

> "[A]ll of the credit for this splendid accomplishment belongs to the Knights of Columbus. . . . [M]en, women, and children throughout the land, when reciting the Pledge of Allegiance of their country, *shall pay homage to Almighty God* by acknowledging their country's dependence upon Him[.]" *Knights of Columbus Archives, Supreme Council Proceedings*, 1954, 39 (emphasis added).

III. THE 1954 ACT ENDORSED MONOTHEISM.

A. As Amended the Pledge Violates the Neutrality Principle of the Establishment Clause.

As shown above, the campaign to add "under God" to the Pledge was infused with a sectarian religious purpose. In

that respect, this case resembles several cases in which this Court has invalidated statutes that reflected a primary religious purpose and that endorsed a particular religious doctrine. Wholly apart from its purpose, moreover, the inclusion of "under God" in the Pledge makes the Pledge, in textual terms, an affirmation of religion and an expression of religious belief. As such, the Pledge violates the neutrality principles announced in the Court's seminal Establishment Clause ruling in *Everson v. Ewing Township*, 330 U.S. 1 (1947).

In that case, Justice Black canvassed at length the history of religious conflict that led to adoption of the Establishment Clause, and concluded that it required that neither states nor the federal government "can pass laws . . . which aid one religion or . . . prefer one religion over another." 330 U.S. 1, 15 (1947). Viewed in the broader context of this statement, the amended Pledge aids those religions which profess a belief in monotheism, and prefers them over those which are non-theistic or polytheistic in belief.

Justice Black also stated in *Everson* that "[The First Amendment] requires the state to be *a neutral* in its relations with groups of *religious believers and non-believers*[.]" *Id.* at 18 (emphasis added). The addition of the words "under God" to the Pledge turned the government into a partisan on the side of religious believers--believers in monotheism, in particular--and against those who are other believers or non-believers, including agnostics and atheists. EGUSD and the United States do not quote Justice Black's statement; their only citation to *Everson* comes in a footnote to the US brief, to make a totally unexceptionable point. US Br. at 24 n.30. Remarkably, the school district's brief does not even cite *Everson*.

The fact that the Pledge as originally codified was wholly secular does not rescue the addition of the words "under God" from constitutional infirmity. Their recitation by

schoolchildren, even as part of a patriotic exercise, requires an affirmation of monotheistic belief and a conception of America as defined by religious devotion, and therefore violates the neutrality command of the Establishment Clause recognized in *Everson*.[2]

B. The Words "Under God" In the Pledge Endorse Monotheism.

EGUSD, the United States, and their supporting amici claim that the words "under God" in the Pledge merely "acknowledge" the role of religion and religious belief in the history of our country. This attempt to avoid constitutional infirmity by declaring "under God," to be nonreligious in meaning fails. Such legerdemain cannot save the phrase.

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[2] See also, *e.g.*, *Wallace*, 472 U.S. at 75 ("It is not a trivial matter . . . to require that the legislature manifest a secular purpose and *omit all sectarian endorsements from its laws*. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally *endorse religion or a religious practice.*") (O'Connor, J., concurring in judgment) (emphasis added). See also *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, *doctrine*, and practice. . . . The First Amendment mandates governmental neutrality between religion and religion, *and between religion and nonreligion.*") (emphasis added); and *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) ("The preeminent purpose of [Louisiana's "Creationism Act"] was clearly to advance the religious viewpoint that a supernatural being created humankind. . . . [B]ecause the primary purpose of the Creationism Act is to endorse a particular religious *doctrine*, the Act furthers religion in violation of the Establishment Clause.") (emphasis added).

There is no doubt that many of the Framers believed in God. But the addition by Congress of the words "under God" in the Pledge was not merely intended to "acknowledge" a dusty historical fact. Congress intended to enlist schoolchildren in "acknowledging" that the United States *today* is or should be a nation "under God," and to affirm their own belief in God. The Pledge as revised is directed not to history but to a *current* profession of belief in God as the Creator of humankind and the source of moral direction for the United States and its citizens.

On this crucial issue, those supporting reversal and those who have joined this brief are in sharp disagreement. The United States denies that the amended Pledge is "normative," describing it as merely "descriptive" of a nation "founded by individuals whose belief in God" inspired their "quest for 'liberty and justice' for each individual." US Br. at 40. Stripped of any normative (and concededly religious) content, the United States claims, the Pledge as recited in public school classrooms is "not a religious exercise at all," but simply an "acknowledgement" of our nation's religious heritage. *Id.* at 45. This argument, however, is foreclosed by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), in which the Court held that the references in the Pledge to "indivisibility," "liberty," and "justice" are not descriptive but aspirational. *Id.* at 634 & n.14.

Those supporting reversal further claim that such an "acknowledgment" has been implicitly approved by *dicta* in several of this Court's opinions, including concurrences and dissents. Their briefs, in fact, are almost exclusively devoted to this claim and consist largely of quotations from Framers and Presidents, along with citation to and quotations from the *dicta* in the Court's opinions. But the words "under God" in the Pledge do not simply "acknowledge" the belief of many Americans, past and present, that God has played a role in this country's history. From a theological

perspective, recitation of the Pledge including the words "under God" and, more specifically, the term "God" affirms a belief in a particular religious doctrine, that of monotheism.

Definitions are important in this case. The definition of "God" is especially important, particularly in its singular, capitalized form, a form that is unique to monotheistic religions, such as Christianity, Judaism, and Islam. In monotheistic religions, it means "the creator and ruler of the universe, regarded as eternal, infinite, all-powerful, and all-knowing; Supreme Being; Almighty." *Webster's New World Dictionary of the English Language, Second College Edition*, 599 (1980). That such a definition of "God" was employed by the congressional sponsors of the "under God" amendment in 1954 is evident from the House report on the bill that Congress adopted: "The inclusion of 'God' in our pledge would . . . acknowledge the dependence of our people and our Government upon the moral directions of the Creator." H.R. Rep. No. 83-1693, at 1-2, *reprinted* in 1954 U.S.C.C.A.N. 339, 2340. The reference to "the moral directions of the Creator" indicates a belief that God is the "Creator" of the universe and has established "moral directions" that Americans should follow.

This conception of God necessarily implies a monotheistic belief. "[T]he term *monotheism* refers to the religious experience and the religious perception that emphasize God as one, perfect, immutable, creator of the world from nothing, distinct from the world, all-powerfully involved in the world, personal, and worthy of being worshipped by all creatures." M. Eliade, ed., *The Encyclopedia of Religion*, Vol. 10, 68-69 (1987). The term "under God" has a specific theological meaning, limited to monotheistic religions. On this issue, amici direct the Court to a serious error in the arguments of petitioners. In its brief in this case, the United States first concedes that "[i]t is true that the Pledge is a

'declaration [of] a belief,'" quoting from *West Virginia v. Barnette*, 319 U.S. 624, 631 (1943). However, the United States then claims that "the belief declared [by the words 'under God' in the Pledge] is not monotheism[.]" US Br. at 43. This statement is incorrect. The term "God" in its singular, capitalized form, is exclusively monotheistic in meaning. It excludes religions that are non-theistic or polytheistic in tradition and doctrine, as well as the philosophical positions of agnosticism and atheism.

Banning asserts that the words "under God" in the Pledge are "reconcilable" and "conformable" with atheism, and that atheist children should be "comfortable" in reciting them in the classroom setting. Banning Br. at 18-20. Atheism, however, cannot be reconciled with theism in any form. These terms are mutually exclusive. Atheism is correctly defined as "the belief that there is no God; or denial that God or gods exist." *Webster's New World Dictionary* at 87. In its broadest sense, theism is "belief in a god or gods." *Id.* at 1474. As noted above, the word "God" in its singular, capitalized form, as employed in the amended Pledge, reflects the monotheistic "doctrine or belief that there is only one God." *Id.* at 922. To suggest that such atheists as Hegel, Spinoza, and Einstein would have been "comfortable" with the words "under God" in the Pledge is simply absurd. Banning Br. at 20-21. The Court should treat such claims as efforts at evasion and obfuscation of the clearly religious content of the amended Pledge.

The formulation of the Pledge belies petitioners' assertion that the words "under God" merely "acknowledge" the Framers' belief in the role of God in our Nation's founding. The Pledge refers to "God" as though "God" exists and has directed the course of American history. Amici suggest that such an assumption raises profound theological issues this Court should not ignore in deciding this case. Petitioners put their argument in these words: "Many Framers attributed

the survival and success of the foundling Nation to the providential hand of God." US Br. at 23. They rest this argument on a clear sectarian basis:

> "The Framers also incorporated in the governmental design aspects of Puritan covenant theology, which advocated, first, a 'compact of a group of individuals with God, by which they became a people, and the subsequent compact between the people and their rulers, by which government was created.'" *Id.* at 23 n.18 (citation omitted).

Several of the amici are familiar with Puritan covenant theology. See, *e.g.*, E. Holifield, *The Covenant Sealed: The Development of Puritan Sacramental Theology in Old and New England, 1570-1720* (1974). This form of theology was based on the inextricable linking of church and state, and the belief that both institutions were "*decreed* by divine providence," as the term "providential" means. *Webster's New World Dictionary*, *supra*, at 1144. The term "providence" itself means acknowledgement of "God, as the guiding power of the universe." *Id.* These definitions are more than semantic in their importance to this case. The entire argument of petitioners flows from this clear sectarian origin. See US Br. at 23-31. In linking the words "under God" to their roots in "Puritan covenant theology," petitioners ask this Court to endorse that theology. The Court should decline that invitation and its endorsement of beliefs that are not shared by a large number of Americans.

IV. THE RECITATION BY SCHOOLCHILDREN OF THE WORDS "UNDER GOD" IN THE PLEDGE CONSTITUTES A RELIGIOUS ACT.

A. Reciting the Words "Under God" In the Pledge Is Akin to Prayer.

Petitioners claim that requiring schoolchildren to recite the words "under God" in the Pledge "is not a religious

exercise at all, let alone a core component of worship like prayer." US Br. at 45. EGUSD echoes this claim in asserting that reciting the Pledge "with the words 'under God' is nothing like the clearly religious act of prayer." EGUSD Br. at 31. Petitioners' arguments rest entirely upon these conclusory statements. However, these claims are based upon a false and misleading distinction between form and substance. As scholars from divergent religious traditions, amici submit that the invocation of God's name, in any setting, is a religious exercise and act. In the classroom setting, recitation of the words "under God" in the Pledge constitutes a religious act that is closely akin to formal prayer, and identical in purpose. The relevant question is not the form of address to God, but the reverent and solemn manner in which God's name is invoked.

The United States uses the word "acknowledgement" or its variations some 31 times in its brief in arguing that reciting the Pledge is merely a "solemnizing ceremony" in which schoolchildren "acknowledge" that "the Nation was founded by individuals who believed in God[.]" US Br. at 46, 32-33. But saying so does not make it so. This supposedly "ceremonial" act is suffused with religious meaning. The term "ceremonial" itself is defined as "an established system of rites or formal actions connected with an occasion, as in *religion*; ritual." *Webster's New World Dictionary* at 232 (emphasis added). Recitation of the Pledge in classrooms, during which students are required to stand and face the flag, with hands over hearts, is certainly a ceremonial ritual, to which the words "under God" add an undeniably religious element. The fact that religion is enfolded within a patriotic ceremony does not rescue these words from constitutional infirmity.

Claims that the amended Pledge merely "acknowledges" the Nation's religious heritage and is purely "ceremonial" in nature are clearly intended to persuade this Court to disre-

gard its earlier decisions holding unconstitutional various forms of prayer in the public schools. This long line of cases, spanning four decades, includes *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Township v. Schempp*, 374 U.S. 203 (1963); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lee v. Weisman*, 505 U.S. 577 (1992); and *Santa Fe School District v. Doe*, 530 U.S. 290 (2000). Significantly, in *Wallace, Lee* and *Santa Fe*, the United States supported the school-prayer exercises this Court emphatically rejected, decisions to which the United States remains unreconciled. See US Br. at 44.

The most relevant of these decisions to the present case is *Lee*, in which the Court held unconstitutional the delivery of prayers by a clergyman at a middle-school commencement ceremony. Notwithstanding its position that the "coercion" test employed by the Court in *Lee* "has no basis in Establishment Clause jurisprudence and is unworkable in the public school environment," the United States concedes that these prayers involved a "state-sponsored and state-directed religious exercise." US Br. at 45, *quoting* 505 U.S. at 587. Amici submit that classroom recitation of the words "under God" in the Pledge constitutes a religious exercise in which schoolchildren are pressured into affirming beliefs they may not share. The Pledge ceremony is led by teachers who are seen by their students as authority figures. "When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. *However 'ceremonial' their messages may be, they are flatly unconstitutional.*" *Lee*, 505 U.S. at 631 (Souter, J., concurring) (emphasis added). It bears noting that the prayers held unconstitutional in *Lee* were delivered at a school commencement held just once each year, at which those attending merely *listened* to them. Conducting a ceremony daily by schoolchildren, in which a Pledge with religious content is recited, is surely a greater violation of the Establishment Clause.

B. The Amended Pledge Is Not A Form Of "Ceremonial Deism."

In their effort to distinguish this case from the school-prayer cases discussed above, petitioners point the Court to decisions that have upheld such practices as legislative prayers and the display of such religious symbols as Christian nativity scenes and Jewish menorahs on public property. See *Marsh v. Chambers*, 463 U.S. 783 (1983); *Lynch v. Donnelly*, 465 U.S. 68 (1983); and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Citation to and discussion of these cases forms a substantial part of petitioners' briefs and arguments. US Br. at 25-40, and EGUSD Br. at 33-41. But none of the challenged activities in these cases took place in public schools, as did those in the school-prayer cases that petitioners urge this Court to distinguish and disregard.

The religious activity involved in *Marsh* has been described as an example of "ceremonial deism," a concept that attempts to distinguish exercises that are meaningfully religious, such as school prayer, from activities that, notwithstanding their use of religious references and symbols, supposedly have no "significant religious content." On this point, petitioners cite Justice Brennan's dissenting opinion in *Marsh* to support their argument that the words "under God" in the Pledge should pass constitutional muster. US Br. at 41, citing 463 U.S. 783, 811 (1983). But this citation ignores Justice Brennan's confession in his *Marsh* opinion that "I frankly do not know what should be the proper disposition" of a challenge to the words "under God" in the Pledge. Justice Brennan suggested that the Pledge might be acceptable if viewed as a "motto" that had "lost any true religious significance." 463 U.S. at 818. In a later opinion, he added that the reference to God in the Pledge could "best be understood . . . as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because

[it has] lost through rote repetition any significant religious content." *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting).

Recitation of the Pledge is not at all similar to the kinds of "ceremonial deism" to which Justice Brennan referred in his *Lynch* opinion, such as the words "In God We Trust" on our currency, or the words "God save the United States and this honorable Court," which petitioners claim are "constitutionally permissible acknowledgements of religion." US Br. at 29. Nor does recitation of the Pledge in public school classrooms resemble the activities of legislative prayer or the display of religious symbols as part of holiday celebrations, to which petitioners direct the Court. No one is asked to affirm any religious belief in handling our currency, or in voluntarily attending this Court's sessions or those of legislative bodies, at which those present are not required to affirm their belief in anything. Nor are members of the public, whatever their religious beliefs, asked to affirm any belief when they observe holiday displays in public places. Such approvals of "ceremonial deism," if they are approvals, are irrelevant to this case.

V. OVER THE PAST TWO CENTURIES, AMERICA HAS BECOME EVER MORE DIVERSE IN RELIGIOUS BELIEF.

From its earliest days, the United States has been a religiously diverse nation. Most of the Colonial settlers were Protestant Christians, but from its founding the nation soon grew to include Catholics, Jews, Buddhists, Hindus, and those who professed no religious beliefs. The issue of America's religious diversity is central to the issues in this case, and raises the following questions: How many Americans adhere to religions that are not monotheistic in belief? How many practice religions that are non-theistic or polytheistic? How many are not religious at all? Those who reject the religious doctrine of monotheism likely include one out of every five Americans.

The most comprehensive recent survey of American religious preferences is the American Religious Identification Survey, conducted by the Graduate Center of the City University of New York in 2001. This report, based on interviews with some 50,000 randomly-chosen respondents, and compared to a similar survey in 1990, found that 78.3 percent of Americans adhere to one of the three great monotheistic faiths (76.5 percent Christian, 2.8 percent Jewish, and 0.5 percent Muslim). The remaining 21.7 percent either had no religious identification or adhered to some other form of faith. Graduate Center, City University of New York, *American Religious Identification Survey* (2002). This report also stated that

> "[t]he greatest increase in absolute as well as percentage terms has been among those adults who do not subscribe to any religious identification; their number has more than doubled from 14.3 million in 1990 to 29.4 million in 2001; their proportion has grown from just eight percent of the total in 1990 to over fourteen percent in 2001." *Id.*

In other words, about one of every seven Americans has *no* religious identification. The CUNY researchers also discovered particularly strong recent growth among Hindus, who often affirm belief in more than one god, and among Buddhists, who typically affirm no belief in a god. Between 1990 and 2001, the American Hindu population rose from 227,000 to 766,000, while the number of Buddhists increased from 401,000 to 1.1 million over the same period. Unitarian Universalists, another religious group with no creedal belief in monotheism, saw their numbers rise from 502,000 to 629,000. See www.gc.cuny.edu/studies/key findings.htm.

Many observers of Asian religions in the United States believe the American Religious Identification Survey severely undercounts both Buddhists and Hindus in this coun-

try. Most scholars, noting a doubling of the Asian Indian population from 815,000 in the United States Census for 1990 to 1.7 million in 2000, fix the number of U.S. Hindu adherents at a minimum of 1 million. The *Yearbook of American and Canadian Churches* (2000), for example, finds 1.1 million Hindus in the United States. The U.S. Buddhist population is harder to gauge accurately, in part because adherence to this religion does not track a particular immigrant population, as does Hinduism. Here scholarly estimates range between one to five million. The most careful scholarly calculation, provided by Professor Martin Baumann of the University of Lucerne in Switzerland, places the number of American Buddhists between three and four million. See M. Baumann, "The Dharma Comes West: A Survey of Recent Studies and Sources," 4 *Journal of Buddhist Ethics* (1997).

Another recent survey by the National Opinion Research Center at the University of Chicago, commissioned by the American Jewish Committee, also reported the rapid growth of Buddhism, Hinduism, and other non-monotheistic religions in the United States. This report concluded that "America has always been a religiously diverse nation, and recent changes in immigration patterns, as well as indigenous religious developments, have increased that diversity." American Jewish Committee, *Religious Diversity in America: The Emergence of Muslims, Buddhists, Hindus, and Others* (2002).

A leading scholar of American religious diversity, Professor Diana L. Eck of the Harvard Divinity School, has recently written that "[t]he framers of the Constitution and the Bill of Rights could not possibly have envisioned the scope of religious diversity in America at the beginning of the twenty-first century. When they wrote the [First Amendment], they unquestionably did not have Buddhism or Santeria in mind." D. Eck, *A New Religious America: How a 'Christian Country' Has Become the World's Most Religiously Diverse Nation*, 7 (2001).

For data on non-theistic and polytheistic religions in America, amici refer the Court to articles in G. Laderman and L. Leon, eds., *Encyclopedia of American Religions and Cultures* (2003). See also E. Queen, et al., *Encyclopedia of American Religious History* (2001), especially the articles on Buddhism, Hinduism, Jainism, Free Thought, and Unitarian Universalism. It is worth noting that there are at least 1,933 Buddhist temples and centers in 48 states, at least 694 Hindu temples and centers in 42 states, and more than one thousand Unitarian Universalist churches and fellowships in all 50 states, according to the Pluralism Project of Harvard University. See www.pluralism.org/director/index. Every one of the fifty largest cities in the United States, and hundreds of smaller cities and towns, has at least one Buddhist or Hindu temple or center, and a Unitarian Universalist church.

Adding the fourteen percent of non-religious Americans to the roughly six percent who adhere to non-monotheistic religions, about one out of five Americans does not subscribe to the monotheism reflected and endorsed in the "under God" affirmation in the Pledge of Allegiance. We can assume that, on average, in every public school classroom of twenty-five students there are five who do not share the monotheistic beliefs of the other twenty. Suppose that a classroom included one Buddhist, one Hindu, one Unitarian Universalist, one agnostic, and one atheist. For these children, the religious content of the Pledge is not trivial.

Petitioners make no mention in their briefs of America's religious diversity, and rely instead on quotations from Framers such as Jefferson and Madison as "repeatedly acknowledg[ing] the Creator." US Br. at 24. As Justice Brennan observed some four decades ago, however:

> "[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well as those who worship according to no version of the Bible and those who worship no God at all. In the face of such profound changes, practices which may have been unobjectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike."

Abington Township v. Schempp, 374 U.S. 203, 240-241 (1963) (concurring opinion).

In this regard, petitioners' citation and quote from *Church of the Holy Trinity v. United States* is revealing. EGUSD Br. at 21. Not only did this Court state in that decision that we are "a religious nation," as petitioners quote approvingly; but added that "this is a Christian nation." 143 U.S. 457, 471 (1892). In *Holy Trinity*, this Court quoted from the Declaration of Independence and statements of the Framers upon which petitioners rely, as reflecting not simply "declarations of private persons [but] the voice of the entire people" of the United States. The Court also quoted from the constitutions of several states that demanded adherence to Christian doctrine by public officials, such as Delaware's requirement that state officers "profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost[.]" *Id.* at 469-70. The Court's conclusion from such sectarian provisions that "this is a Christian nation" undoubtedly reflected the justices' shared religious beliefs at the time. Whatever the validity of that assertion then, it is demonstrably mistaken now. More than a century later, we are a religiously diverse nation, whose "entire people" do not all share a belief in the Trinitarian doctrine endorsed in

Holy Trinity, let alone in the monotheism endorsed in the Pledge of Allegiance.

VI. THE INCLUSION OF "UNDER GOD" IN THE PLEDGE CONFRONTS SCHOOLCHILDREN WITH THE HOBSON'S CHOICE OF AFFIRMING RELIGIOUS BELIEFS THEY DO NOT HOLD OR FORGOING PARTICIPATION IN A PATRIOTIC EXERCISE.

In *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), Justice Frankfurter wrote for the Court in upholding the expulsion from public school of children who belonged to the Jehovah's Witnesses denomination, for refusing on religious grounds to salute the American flag and recite the Pledge of Allegiance. Justice Frankfurter denied that, "though the ceremony may be required, exceptional immunity must be given to dissidents" such as Lillian Gobitis and other schoolchildren who shared her religious beliefs. *Id.* at 599-600 (1940) (emphasis added). See also P. Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*, Ch. 1 (interview with Lillian Gobitis about the ostracism she endured in 1935) (1989).

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court overruled *Gobitis*. The point here is that among the nation's fifty million children who attend public school today are several million "dissidents" from the monotheistic beliefs embodied in the "under God" words of the Pledge of Allegiance. Although *Barnette* permitted public schools to require the recitation of the Pledge as long as "dissidents" were not required to participate, *Lee* and *Santa Fe* teach that school sponsored religious exercises, though ostensibly voluntary, are indirectly coercive, and that the Establishment Clause forbids such indirect coercion.

Schoolchildren who do not adhere to the monotheism endorsed in the Pledge are impermissibly forced to choose between affirming religious beliefs they do not hold and foregoing participation in an official patriotic ritual. Those who adhere to their convictions by remaining silent or leaving the classroom during recitation risk being seen as "outsiders" by their peers and branded as unpatriotic.[3]

Amici are not trained in psychology and make no pretensions to know precisely what goes on in the minds of schoolchildren who might harbor doubts about reciting a Pledge of Allegiance that requires them to affirm a belief that America is "under God." But they do know that the term "under God" has a specific theological meaning, lim-

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[3] The question in this case is not whether schoolchildren can be forced to recite the Pledge of Allegiance on pain of expulsion, suspension, or other form of discipline. This Court's opinion in *Barnette* resolved that question in 1943. Efforts to compel student participation in the Pledge ritual nonetheless continue, more than six decades later. Arkansas, Colorado, Pennsylvania, Tennessee, and Texas currently require by statute that students who object to reciting the Pledge must present written consent from their parents to be excused from the Pledge ritual. Education Commission of the States, Character/Citizenship Education, Pledge of Allegiance, August 2003. The most egregious example is found in the regulations of the Miami-Dade (Florida) County School Board, which provide that "[s]tudents *will be taught not to pause* after 'one nation' when reciting the pledge of allegiance to the flag." These regulations also provide that school officials "will counsel with students who do not participate in the pledge and flag salute," and that "[p]arents are to be contacted to determine the reason for the student's behavior. Parents will be asked to provide a written request to excuse the student from reciting the pledge." See Miami-Dade County Board of Education, Regulation 6A-1.08 (emphasis added).

ited to monotheistic religions and excluding polytheistic or non-theistic religions. The term certainly excludes those who are agnostic or atheist.

Amici also know, from their studies of American religious history, that adherents of polytheistic and non-theistic religions, and those with no religious beliefs, are often subjected to public hostility. Much of this hostility stems from lack of knowledge of these minority religions, or from stereotypes that are based on misperceptions of their practices and beliefs. Such hostility is painful to adults, but must be even more painful to children who are subjected to ostracism when they decline to participate in the flag salute and Pledge rituals in their schools. Back in the 1930s, after Lillian Gobitis refused on religious grounds to salute the flag and recite the Pledge of Allegiance in her seventh-grade classroom, she was subjected to taunts and jeers by fellow students before her expulsion. As she later said, "After that, when I'd come to school they would throw a hail of pebbles and yell things like, 'Here comes Jehovah!'" P. Irons, *A People's History of the Supreme Court*, 337 (1999). See Ch. 26, "We Live by Symbols," 333-347.

More recently, MaryKait Durkee, a high-school junior at Fallbrook High School in San Diego County, California, was suspended from school in 1998 for refusing to stand for the flag salute and Pledge because she did not believe in God, or that America was a land of "liberty and justice for all." For this stand, she was editorially chastised by the *San Diego Union-Tribune* for her "lack of respect for the country she lives in." *Id.* at 347.

And in 2002, Janey Tracey, a sixth-grade student at H. C. Crittenden Middle School in Armonk, New York, faced a similar dilemma: "I realized how wrong the Pledge was, since it made atheists and polytheists feel excluded, so I stopped standing every morning. However, my teacher made me stand. I looked this up, and I found that a student

does not have to stand for the Pledge if they have a legitimate reason." Statement of Meredith Jane Tracey (12-23-2003); on file, Earl Warren Bill of Rights Project, University of California, San Diego.

The American flag is a potent national symbol, and the Pledge of Allegiance to that flag is a potent ritual. The addition of the words "under God" to the Pledge, however, merged patriotism and religion, investing that ritual, in the unique classroom setting, with a profoundly sectarian character. Schoolchildren who are required to "confess by word or act their faith" in the monotheistic "orthodoxy" embodied in those words, but who do not share that faith, run the risk of being stigmatized as "outsiders" in their classrooms if they object to reciting the Pledge. In its present religion-embracing form, the Pledge sends a powerful message to such children "that they are outsiders, not full members of the political community, and an accompanying message to adherents [of monotheism] that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully,

Peter Irons
Director, Earl Warren Bill of Rights Project
9500 Gilman Drive
San Diego, CA 92093-0521
(858) 534-3664

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Joseph A. Adler is Professor of Religion at Kenyon College. He holds the M.A. and Ph.D. degrees in Religious Studies from the University of California, Santa Barbara. His research focuses on East Asian religions, and his books include *Chinese Religious Traditions*.

Randall Balmer is the Ann Whitney Olin Professor of American Religion, and Chair of the Department of Religion at Barnard College, Columbia University. He earned an M.A. and Ph.D. in Religion from Princeton University, and also holds an M.Div. degree from Union Theological Seminary. His books include *Religion in American Life: A Short History*, and *Religion in Twentieth Century America.*

Linell E. Cady is the Franca Oreffice Dean's Professor of Religious Studies, and Director of the Center for the Study of Religion and Conflict at Arizona State University. She holds a Ph.D. from Harvard University. Her research has focused on the relationship of religion and civil discourse in America, and her books include *Religion, Theology, and American Public Life.*

Diana L. Eck is Professor of Comparative Religion at Harvard Divinity School. She holds a Ph.D. from Harvard University. Since 1991, she has headed the Pluralism Project, which explores issues of religious pluralism in American society. Her books include *The New Religious America: How a 'Christian Nation' Became the World's Most Religiously Diverse Nation.*

W. Clark Gilpin is the Margaret E. Burton Professor of the History of Christianity and Theology in the Divinity School of the University of Chicago, and Director of the Martin Marty Center. He holds an M.Div. degree from the Lexington Theological Seminary and a Ph.D. from the University of Chicago. His research focuses on the relation between religion and education in American society, and his books

include *A Preface to Theology* and a biography of Roger Williams.

Philip Goff is Associate Professor of Religious Studies, and Director of the Center for the Study of Religion and American Culture at the University of Indiana. He received a Ph.D. from the University of North Carolina, and his books include *Themes in American Religion and Culture* and *Religion in America, 1945-2000: A History in Documents.*

John S. Hawley is the Ann Whitney Olin Professor in the Department of Religion at Barnard College, Columbia University. He received at M.Div. degree from Union Theological Seminary and a Ph.D. in Comparative Religion from Harvard University. He is an authority on the Hindu traditions in India and the United States.

Gary M. Laderman is Associate Professor in the Department of Religion, and is Director of the Graduate Division of Religion at Emory University. He received his M.A. and Ph.D. degrees from the Religious Studies Department at the University of California, Santa Barbara. His research focuses on American religious history, and he is co-editor of the three-volume series, *Religion and American Cultures: An Encyclopedia of Traditions, Diversity, and Popular Expressions.*

Amy-Jill Levine is the E. Rhodes and Leona B. Carpenter Professor of New Testament Studies, and Director of the Carpenter Program in Religion, Gender, and Sexuality at the Vanderbilt University Divinity School. She received the M.A. and Ph.D. degrees from Duke University. Her research focuses on such topics as Christian origins, formative Judaism, and the "Historical Jesus." She is editor of a twelve-volume series, *Feminist Companions to the New Testament and Early Christian Literature.*

Fumitaka Matsuoka is Professor of Theology at the Graduate Theological Union in Berkeley, California. He received a Ph.D. from the Union Theological Seminary, and has served as pastor of the Church of the Brethren in Oakland, California. He is an authority on the Buddhist tradition in America, and his books include *Realizing the America of Our Hearts: Theological Voices of Asian Americans.*

Vasudha Narayanan is Professor of Religion at the University of Florida, and is a past president of the American Academy of Religion, and of the Society for Hindu-Christian Studies. She holds a Ph.D. from the University of Bombay. Her research interests include Hindu traditions in India, Cambodia, and the United States, and her books include *The Hindu Traditions in the United States: Temple Space, Domestic Space, and Cyberspace.*

Charles Prebish is Professor of Religious Studies at Pennsylvania State University. He received a Ph.D. in Buddhist Studies from the University of Wisconsin. He has been Associate Secretary of the International Association of Buddhist Studies, and his books include *Asian Religions in America: A Documentary History.*

Stephen Prothero is Associate Professor of Religion and Chair of the Department of Religion, and Director of the Graduate Division of Religious and Theological Studies at Boston University. He received a Ph.D. from Harvard University, and his research focuses on Asian religious traditions in the United States. His books include *Asian Religions in America: A Documentary History.*

Richard Seager is Associate Professor of Religious Studies at Hamilton College. He holds a Ph.D. from Harvard University, and his research focuses on Asian religions in the United States. He is the recipient of the Scholarly

Achievement Award of the Institute of Oriental Philosophy, and his books include *Buddhism in America.*

John Smolenski is Assistant Professor of History at the University of California, David. He earned an M.A. degree from Yale University, and M.S. and Ph.D. degrees from the University of Pennsylvania. His research focuses on American religious history in the colonial period, and he is co-editor of *New World Orders: Violence, Sanction, and Authority in the Early Modern Americas.*

Ivan Strenski is Professor and Holstein Endowed Chairholder in the Department of Religious Studies at the University of California, Riverside. He received a Ph.D. in Religious Studies from Birmingham University in England, and his research interests include the history of religions. He has received the Templeton Prize in Science and Religion, and his books include *Religion in Relation: Method, Application, and Moral Location* and *Four Theories of Myth in Twentieth-Century History.*

Robert A. Thurman is the Jey Tsong Khapa Professor of Indo-Tibetan Buddhist Studies and Director of Graduate Studies in the Department of Religion at Columbia University. A former Buddhist monk, he is a long-time advisor to His Holiness the Dalai Lama. His books include *Essential Tibetan Buddhism* and *The Tibetan Book of the Dead.*

Thomas A. Tweed is Professor of Religious Studies at the University of North Carolina. He holds M.A. and Ph.D. degrees in Religious Studies from Stanford University, and the Master of Theological Studies degree from the Harvard Divinity School. His research centers on both Roman Catholicism and Asian religions in the United States. His books include *Retelling U.S. Religious History* and *Asian Religions in America: A Documentary History.*

Peter W. Williams is Distinguished Professor of Comparative Religion and American Studies, and Director of the Program in American Studies at Miami University of Ohio. He received the M.A. and Ph.D. degrees in Religious Studies from Yale University. His books include *America's Religions: From the Origins to the Twenty-First Century.*